IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29/07/2003

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA

SECOND APPEAL NO.1924 OF 2001
AND
CMP.NOs.20275 & 20276 of 2001

Vimalammal
W/o. Karthikeyan .. Appellant / 3rd Defendant

-Vs-

1. Duraisamy Naidu
S/o. Muthiyalu Naidu .. Respondent-1/Plaintiff

2. R. Sureshbabu
S/o. Rajagopal

3. R. Nithiyanandam Naidu,
S/o. Rajagopal .. Respondents/Defendants 1&2

Appeal filed under Section 100 of Code of Civil Procedure against the judgment and decree made in A.S.No.5 of 1999, on the file of Principal District Judge, Vellore dated 18.7.2001 confirming the judgment and decree made in O,.S.No.737 of 1996, on the file of Principal District Munsif of Vellore dated 17.12.1998.

!For Petitioner : Mr.P. Peppin Fernando

^For Respondent- 1 : Mr.A. Thyagarajan

Respondents 2-3 : Mr.R. Ashokan

:J U D G M E N T

Third defendant has filed this second appeal against the confirming decisions of the courts below.

2. The suit was filed for specific performance of the contract. It is the case of the plaintiff / respondent No.1 that he had entered into an agreement with Rajagopal Naidu, father of the defendants 1 & 2 for purchase of the disputed property for a sum of Rs.30,000/-. At the time of agreement dated 14.2.1991, the defendants 1 & 2 and their father had

received a sum of Rs.20,000/-. The plaintiff approached the defendants on several occasion, but the execution of the sale deed was being delayed on some pretext or the other. Subsequently, the plaintiff came to know that Rajagopal Naidu and the defendant No.3 (appellant) had colluded with each other and a sham and nominal sale deed has been created in favour of the third defendant by Rajagopal Naidu and the second defendant. A lawyer□s notice was issued calling upon the defendants to execute the sale deed. The defendants 2 & 3 replied the notice denying the execution of the agreement and stated that out of 66 cents, 43 cents had been purchased by the third defendant. After the death of Rajagopal Naidu, the suit has been filed. It has been stated by the plaintiff that he was always ready and willing to perform his part of the contract.

3. The first defendant filed a written statement wherein the execution of the agreement was admitted. It was also indicated that the said defendant was willing to complete the transaction. It was also further stated that the sale deed executed in favour of the third defendant was not binding on the first defendant.

4. In the written statement filed by the second defendant, execution of the agreement was admitted. It was further indicated that the second defendant was willing to complete the transaction. It was further stated that the third defendant was aware of the agreement of sale, but a document has been created as if a portion of the property has been sold by the first defendant and his father. It is also stated that the disputed property was not divided between the defendants 1 & 2 and their father.

5. The third defendant entered appearance through an Advocate, but subsequently remained ex-parte.

6. On the basis of the evidence adduced on behalf of the plaintiff, the trial court decreed the suit as prayed for by the plaintiff against the defendants 1 & 2 and the suit was decreed ex-parte against the third defendant.

7. Aggrieved by the judgment and decree of the trial court, third defendant preferred appeal in A.S.No.5 of 1999. In the appeal, the third defendant filed an application under Order 41 Rule 27 C.P.C to accept the written statement prepared by him. The lower appellate court rejected such application and confirmed the decision of the trial court on merit. Aggrieved by the said decision, the third defendant has come in this Second Appeal.

8. Learned counsel appearing for the appellant has submitted that as a matter of fact an application under Order 9 Rule 13 had been prepared and presented, but the same was not numbered. It has been further contended that since the sale deed has been executed in favour of the third defendant, the suit for specific performance should not have been decreed in

respect of the property covered under the sale deed in favour of the third defendant. It has been also indicated that since the suit has been decreed ex-parte without giving an opportunity to the respondent No.3, the same should be remanded for fresh consideration.

9. A defendant against whom an ex-parte decree is passed has several remedies open to him. He can file petition under Order 9 Rule 13 to set aside the ex-parte decree and if there is sufficient cause for his absence or if he shows that summons had not been served, such ex-parte decree can be set aside. If summons in a suit is fraudulently suppressed and the decree is obtained, such an aggrieved person can also file a separate suit for setting aside the decree on the basis of the fraudulent suppression of summons. Even without taking recourse to the aforesaid remedies, an aggrieved defendant, against whom an ex-parte decree has been passed, can also file an appeal challenging the decree on merit. However, in such an appeal he can succeed only if it is established that the judgment o f the trial court is erroneous in law or in fact.

10. In the present case, the third defendant has adopted the latter course. The appellate court has considered the matter on merits and has come to a conclusion that the judgment of the trial court was correct. As a matter of fact, the judgment was based on the ex-parte evidence. On going through the judgment passed by the trial court as well as the appellate court, it cannot be said that any substantial error has been committed so as to warrant interference in the second appeal. The courts below have come to the conclusion that the agreement in favour of the plaintiff was earlier and there was no material before them to come to a conclusion that the third defendant was a bonafide purchaser for value without notice of the earlier agreement.

11. Learned counsel for the appellant has however submitted that there was sufficient cause for the absence of the third defendant and therefore, the ex-parte decree should be set aside. The third defendant could have taken recourse to Order 9 Rule 13. Even though some attempts had been made to file such an application, but the same was rejected because of certain defects. The third defendant should have pursued the matter by filing appropriate application under Order 9 Rule 13 along with the application under Section 5 of the Limitation Act.

12. The appellant is trying to make out a case of sufficient cause for the absence. Such a matter can be gone into only in the petition filed under Order 9 Rule 13 CPC., and not in the appeal from the ex-parte decree itself, where the questions would be confined to merit arising from the judgment and materials on record.

13. The appellant had filed application under Order 41 Rule 27 CPC before the lower appellate court for accepting the written statement prepared by him. Such a course is unknown to law and had been rightly rejected by the lower appellate court.

14. For the aforesaid reasons, I am unable to entertain this Second Appeal, which is accordingly dismissed. It is however made clear that it would be open to the defendant No.3 to take steps in accordance with law for refund of the consideration. However, no opinion is expressed on merit on this aspect. No costs. Consequently, the connected miscellaneous petitions are closed.

Index : Yes
Internet : Yes

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To

1. The Principal District Judge, Vellore, Vellore District.
2. The Principal District Munsif, Vellore, Vellore District.
3. The Record Keeper, V.R. Section, High Court, Madras.